

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOREEN SUSSINO,
PLAINTIFF

Vs.

CIVIL NO.
15-5881 (PGS)

WORK OUT WORLD, INC., et al,
DEFENDANTS

AUGUST 1, 2016

CLARKSON S. FISHER COURTHOUSE
402 EAST STATE STREET
TRENTON, NEW JERSEY 08608

B E F O R E: THE HONORABLE PETER G. SHERIDAN
U.S. DISTRICT COURT JUDGE
DISTRICT OF NEW JERSEY

A P P E A R A N C E S:

MARCUS ZELMAN, LLC
BY: ARI H. MARCUS, ESQUIRE
FOR THE PLAINTIFF

ANSELL, GRIMM & AARON, PC
BY: JOSHUA S. BAUCHNER, ESQUIRE
FOR THE DEFENDANT

HEARING ON MOTION TO DISMISS

Certified as true and correct as required
by Title 28, U.S.C. Section 753
/S/ Francis J. Gable
FRANCIS J. GABLE, C.S.R., R.M.R.
OFFICIAL U.S. REPORTER
(856) 889-4761

1 THE COURT: The first matter is Sussino versus Work
2 Out World. Do you want to enter your appearances? We will
3 start with the plaintiff.

4 MR. MARCUS: Good morning, your Honor, Ari Marcus
5 from Marcus and Zelman representing the plaintiff.

6 THE COURT: Good morning, Mr. Marcus.

7 MR. BAUCHNER: Good morning, Joshua Bauchner of
8 Ansell, Grimm and Aaron on behalf of the defendants.

9 THE COURT: Good morning, Mr. Bauchner.

10 So, this is your motion to dismiss, Mr. Bauchner?

11 MR. BAUCHNER: Yes, sir.

12 THE COURT: Do you wish to be heard?

13 MR. BAUCHNER: I came all the way from New York City
14 for this hearing.

15 THE COURT: Might as well.

16 MR. BAUCHNER: Thank you. And I'm confident the
17 Court's read the papers so I'll be brief.

18 THE COURT: I have.

19 MR. BAUCHNER: Your Honor, this whole case is about
20 one single unanswered call, and we put the emphasis on single
21 and unanswered. Every case plaintiff relies on to establish a
22 concrete injury under the recent *Spokeo* case from the United
23 States Supreme Court is distinguishable, and critically
24 distinguishable on that basis alone.

25 Those cases involved 17 auto-dialed calls, 31

1 auto-dialed calls; cases where the plaintiffs tried to contact
2 the maker of the call, begged to be taken off the list and
3 were ignored. We have one single unanswered call here, your
4 Honor, it's critical.

00:01 5 To try the cure that critical defect, plaintiff
6 claims that injuries sustained by auto-dialed calls are
7 inherent and self-evident. But your Honor, that is exactly
8 the type of argument that the Supreme Court rejected in
9 *Spokeo*, where it said and I'm quoting, "Congress' role in
00:01 10 identifying and elevating intangible harm does not mean that a
11 plaintiff automatically satisfies the injury-in-fact
12 requirement whenever a statute grants a person a statutory
13 right and purports to authorize that person to sue to
14 vindicate that right."

00:02 15 Here that's exactly what happened. The call was
16 allegedly made I believe on July 25th, and three days later we
17 have a class action complaint as a result of again one single
18 unanswered phone call.

00:02 19 And critically, your Honor, plaintiff doesn't allege
20 any concrete harm, any actual harm as required by *Spokeo*
21 resulting from that call. Plaintiff doesn't allege she
22 answered the call, we know she didn't. There was no intrusion
23 upon her privacy as a result of that. She doesn't claim that
24 it deleted her battery, she doesn't claim it somehow took her
00:02 25 away from other phone calls, like the fax machine cases where

1 the fax machine's in use others can't use that fax. She
2 doesn't claim that she spent any time answering the call, and
3 her reliance on other putative class members, your Honor, who
4 may have suffered harm, who may have had their minutes
00:02 5 depleted, doesn't work because the Supreme Court also tells us
6 that a plaintiff who seeks to serve as a class representative
7 can't establish her standing by relying on absentee class
8 members.

9 So we're left with a plaintiff here, your Honor,
00:03 10 whose concrete injury is a single unanswered phone call, and
11 that just is insufficient to establish standing under Article
12 III of the Constitution, your Honor. And every case, again,
13 cited by plaintiff is critically distinct on that basis. This
14 is simply an attempt to manufacture a class action, your
00:03 15 Honor. That's why two days after the unanswered phone call
16 the complaint was filed. No effort was made by her whatsoever
17 to contact us.

18 And critical, your Honor, in the Roma declaration we
19 submitted with our reply, we certify that not a single other
00:03 20 alleged recipient of these calls called to complain. Or
21 otherwise we concede sure there's --

22 THE COURT: I don't know how I get into that
23 certification on a motion to dismiss, however.

24 MR. BAUCHNER: Your Honor, it's a 12(b)(1), and on a
00:03 25 12(b)(1) you can consider --

1 THE COURT: Oh, on a jurisdiction issue.

2 MR. BAUCHNER: Absolutely. It's a Rule 12(b)(1)
3 application here, your Honor. We cited to the case law and
4 the standard of review, and the Court is absolutely entitled
5 to not only consider affidavits and other evidence, but the
6 Court further, your Honor, unlike on a 12(b)(6) needn't accept
7 any of plaintiff's allegations as true.

8 THE COURT: All right.

9 MR. BAUCHNER: And that actually, your Honor, we set
10 forth in our opening papers --

11 THE COURT: But if I have the issue on a motion to
12 dismiss back based on jurisdiction, I always give the
13 plaintiff an opportunity to do discovery on it, and to, you
14 know, take depositions to see if the certifications are
15 correct.

16 MR. BAUCHNER: Your Honor, I don't -- I don't
17 dispute that and I certainly understand it, however, here
18 plaintiffs already amended their complaint once. They've
19 already sought to correct the defects in their original
20 complaint, which I presume they've acknowledged otherwise they
21 wouldn't have amended. No matter what discovery they could
22 do, your Honor, they're not going to be able to find that
23 plaintiff here received more than one unanswered phone call,
24 and that defect is alone.

25 Even again if they find that others might have

1 received these calls and that others might have answered the
2 calls, that's insufficient, because those others in that
3 putative class, they don't serve to satisfy plaintiff's
4 standing. So no amount of discovery, your Honor, is going to
5 change the fact that plaintiff only received one unanswered
6 phone call, which does not amount to concrete harm.

7 THE COURT: But you were talking about a different
8 fact, sir. You brought up that -- you cited the certification
9 saying that no other person complained about the calls; that's
10 the assertion that I was making reference to, like really.
11 The one unanswered call, that's a different fact that we're
12 dealing with, and I believe that's set forth in the complaint.

13 MR. BAUCHNER: I understand, your Honor, I recognize
14 the two different issues. My point is simply that there were
15 no other complaints and they can have discovery on that, but
16 even if they take discovery on it that it's still not going to
17 endow plaintiff with standing.

18 THE COURT: Do you have any other issues?

19 MR. BAUCHNER: Yes, there's a second -- the other
20 big issue, your Honor, is the offer of judgment.

21 THE COURT: So the *Campbell* issue.

22 MR. BAUCHNER: The *Campbell* issue, your Honor,
23 exactly. This case is distinct from every single case
24 plaintiff cites, because here the offer was made and the
25 payment was not only tendered, it was received. And that is

1 the critical linchpin in all of the cases where the plaintiff
2 actually receives the funds; that ends it, there's no case or
3 controversy.

4 Now, she makes an argument, your Honor, that it was
5 a different credit card, but she attested on her membership
6 agreement it was her card. She used the card for her gym
7 membership, she somehow in our declaration says --

8 THE COURT: Please give me the timing of that.

9 MR. BAUCHNER: When the funds were refunded, your
10 Honor? March.

11 THE COURT: Because I'm trying to figure out when
12 the refund was made; was it before the suit or after the suit?

13 MR. BAUCHNER: After the suit in conjunction with
14 our offer of judgment, your Honor. I believe the refund was
15 made in March of this year. And plaintiff kept those funds
16 the entire time until we filed our original motion to dismiss,
17 at which point she then tried to return the funds, but months
18 and months later. But the fact of the matter was in that
19 interim, she actually received the funds, they were refunded
20 to her credit card.

21 And all of the courts, including the majority in
22 *Campbell*, have said that the critical linchpin in assessing
23 the offer of judgment, is the offer, tender and receipt of
24 funds. Here, the funds were actually received, and three
25 months later, to try to save her class action, she decided to

1 write a check back for those funds. But they were already
2 received, your Honor, and she can't undo that critical fact.

3 THE COURT: So, when you issue a credit on a credit
4 card, the credit card holder doesn't have to do anything, you
5 just sent in a payment to her credit card company; is that
6 what happened?

7 MR. BAUCHNER: The credit -- we had the refund -- I
8 guess it's not a refund. We had the tender made on to her
9 credit card, and it actually said WOW Tender of Judgment. So
10 on her bill, it would have said WOW Tender of Judgment,
11 \$1,501. Completely transparent to her. And we submitted some
12 of the documentation to substantiate the transaction how it
13 was made, and the funds were kept.

14 Now, your Honor --

15 THE COURT: I understand the argument.

16 MR. BAUCHNER: Okay.

17 THE COURT: Do you have any others?

18 MR. BAUCHNER: That's all, your Honor. Thank you.

19 THE COURT: Mr...

20 MR. MARCUS: Marcus.

21 THE COURT: Marcus. I'm sorry.

22 MR. MARCUS: That's okay, your Honor.

23 THE COURT: You're here so often, I should remember.

24 MR. MARCUS: I will be brief as well.

25 THE COURT: Can you just go into the Spokeo analysis

1 for me, please?

2 MR. MARCUS: The *Spokeo* analysis first, yes, that's
3 fine, your Honor. I just want to point out one point. In
4 *Spokeo* the court did not state that the plaintiff there had no
5 standing or didn't have a concreted injury to confer standing,
6 the court actually remanded it back to Ninth Circuit.

7 And the reason being that they said that they didn't
8 analyze it correctly -- it was actually an 8-0 decision based
9 on principle, even though 6-2, the two dissenters said that
10 the Supreme Court should lend it to the next step, and how the
11 plaintiff here does have standing. So there was no -- it
12 wasn't reversed based on the plaintiff not having standing
13 there.

14 But to move forward just on it, *Spokeo* didn't teach
15 us much that we already didn't know; we knew you needed
16 standing under Article III to be in federal court. What
17 *Spokeo* mentioned is that the analysis you should look at is
18 whether the plaintiff had a concrete and particularized
19 injury. And in defining what a concrete injury is, the
20 Supreme Court mentioned three points: One, all you need is an
21 injury based on a risk of harm; two, you don't need a tangible
22 injury, but -- and I quote: "Intangible injuries can
23 nevertheless be concrete; and number three, to evaluate
24 intangible harms, courts should look at both the history and
25 judgment of Congress when deciding whether --

1 THE COURT: So, do you agree that there was only one
2 call made to your client?

3 MR. MARCUS: I agree that my client has represented
4 to us that she only received one call. I don't know if
5 there's previous calls beyond -- and the issue of the amount
6 of calls goes towards damage, it doesn't go toward standing.
7 The Supreme Court stated you needed a concrete injury. And
8 whether that injury is de minimus, it's small, that's all you
9 need.

10 So whether it's one call, that will go towards the
11 damage. If you have a thousand calls or one call, it doesn't
12 make a difference. If it's a harm, if the phone call itself
13 is a harm, a concrete harm that Congress intended to confer
14 standing on to, which Congress did here, then you have
15 standing.

16 In fact --

17 THE COURT: Well, if you look at the TCPA, it talks
18 about prevention of annoying and repeated telemarketing calls.
19 I'm just reading out of the ABCs of the TCPA by Mark Ellis,
20 but within that article they set forth the issues that were
21 trying to be addressed, and they talk about it in terms of
22 repeated and annoying. So, if there's only one it's not
23 repeated; and annoying isn't usually -- I wouldn't associate
24 it with one call. It seems to me you get annoyed when you get
25 a number of calls.

1 MR. MARCUS: Well, that's true, your Honor, but the
2 statute's not reading where you have to have more than one
3 call to have a violation. Any amount of calls would give you
4 a violation of the Act. And consumers today are getting a
5 bunch of calls from everywhere, so you have to add them up.
6 And if companies can use machines to call you and constantly
7 call you, that's exactly what Congress was intending to
8 protect.

9 And just because the plaintiff here sued after the
10 first call and not waited until five or six or 10 or 12 calls
11 doesn't make a difference, all it goes toward is damage. It's
12 a statutory damage you can get per call. Plaintiff could have
13 waited to 20 or 30 calls and then we would have got the
14 argument from defendant that she didn't mitigate her damage,
15 she should have sued right away right when she knew it was a
16 violation of the Act.

17 And I just want to point out pre-*Spokeo* the Supreme
18 Court dealt with this issue under the TCPA twice. Pre-*Spokeo*
19 they had two TCPA decisions in front of them; the first being
20 in 2012, *Mims v. Arrow Financial*, and there they dealt with
21 the issue of whether you have -- whether a consumer can sue in
22 federal court under the TCPA. And Congress answered -- I mean
23 the Supreme Court answered in the affirmative. And there
24 obviously they dealt with the issue of whether a plaintiff is
25 allowed to sue in federal court. It's something they were

1 thinking of.

2 Now, defendant can argue well, 2012 was pre-*Spokeo*,
3 they weren't dealing with the issue of standing. They also
4 recently in the *Campbell-Ewald* case, the *Campbell* case that
5 defendant mentioned for a different reason, dealt with a TCPA
6 case, one text message, one text message. And it would be
7 hard to argue the Supreme Court didn't have *Spokeo* in mind
8 being that they heard it right after *Campbell-Ewald*, they knew
9 they were dealing with that.

10 And in that decision when they decided an offer of
11 judgment does not moot a class, Justice Roberts noted: That
12 the court's agreement that a receipt of an unwanted telephone
13 call was undisputedly an injury in fact. And I quote: "All
14 agree that at the time Gomez filed suit he had a personal
15 stake in the litigation; in his complaint Gomez alleged that
16 he suffered an injury in fact when he received an unauthorized
17 text message from Campbell."

18 Again, one text message; they knew about *Spokeo*,
19 they were dealing with *Spokeo* at the same time, and they
20 easily could have said that the plaintiff doesn't have
21 standing there, but they didn't, because they understood the
22 plaintiff did have standing.

23 Now, I'd just like to talk about the cases after
24 *Spokeo* now, all the cases which dealt with this issue of
25 getting unwanted phone calls. First being *Booth v. Appstack*,

1 I'm just going to quickly go over three of them, because
2 there's a lot of them in our motion because we have a lot of
3 cases to support our position. The court held that: While
4 the injury in *Spokeo* is arguably procedural and thus not
5 concrete, the TCPA is an injury that Congress agrees is
6 sufficiently concrete to confer standing. No mention of the
7 amount of calls you need to confer standing. The TCPA itself
8 is an injury that Congress agrees is sufficiently concrete to
9 confer standing.

10 Second case, *Rogers v. Capital One*; the court held
11 that by merely alleging that calls were made to a personal
12 cellphone, plaintiff has suffered particularized injuries that
13 were suffered to support standing. Again, no mention of the
14 amount of calls. There in that case plaintiff didn't even
15 allege a harm and the court said that's sufficient; you don't
16 have to allege a harm because the TCPA itself is self-evident.

17 The third case, *Mey v. Got Warranty*, held that
18 plaintiff has standing to sue since the harm caused by
19 unwanted calls are self-evident. No mention of the amount of
20 calls you need.

21 Now, defendant brings up two cases to support their
22 position, both of them are clearly inapposite. It doesn't
23 mention the facts in their brief about those cases because
24 it's clear that they have no relevance here. The first being
25 *Stoops v. Wells Fargo*, which I'm sure your Honor is aware of.

1 That is a case where a plaintiff admitted that she purchased
2 cellphones inviting calls with the hope of getting calls so
3 she can sue under the TCPA; she admitted that that was her
4 business. The court held there that obviously there was no
5 harm, she wanted these calls, this was her business.

6 THE COURT: There's an exception to standing where
7 you manufacture the claim or create the claim in the *Stoops*
8 case --

9 MR. MARCUS: Correct.

10 THE COURT: And the court found that.

11 MR. MARCUS: That's right.

12 THE COURT: So I think that's factually different
13 than what we're looking at here.

14 MR. MARCUS: I agree, that's exactly my point, that
15 this is the only case that defendant has to support their
16 position of *Stoops*, which is not relevant to our case. The
17 second case which they bring up in their reply brief for the
18 first time is the *Sartin v. EKF Diagnostics*, that's a fax
19 case, TCPA fax case. There the plaintiff did not allege any
20 harm, the complaint was written before *Spokeo*, and there the
21 court did not state that plaintiff did not have standing, the
22 court stated that there was a procedural issue because the
23 plaintiff didn't allege harm, so the court granted plaintiff
24 leave to amend the complaint and alleged harm. So again, not
25 relevant to our case.

1 Now, our last point on *Spokeo* is that this is not a
2 risk of harm, this is not an intangible injury, these are
3 tangible real injuries. And I'm not sure why defendant is
4 stating we didn't allege this in the complaint because we did
5 allege it. And while some of them may be minor and may be
6 small, that's all you need for standing in federal court.
7 Like nuisance, like lost use of property, like depletion of
8 battery life; these are small injuries, all mentioned in the
9 three cases I spoke about post-*Spokeo* which held were enough
10 to confer standing. So defendant is asking this Court to be
11 the one outlier, the one court post-*Spokeo* who decides that
12 plaintiffs don't have standing on a TCPA violation.

13 And I'd just like to address the *Campbell-Ewald*
14 quickly --

15 THE COURT: Okay.

16 MR. MARCUS: The facts of the case are as follows.
17 He filed a complaint, defendant made an offer of judgment,
18 Rule 68 offer of judgment; our case was stayed pending the
19 *Campbell-Ewald* decision. The Supreme Court decided that a
20 defendant cannot moot a class by making an offer of judgment.

21 Thereafter defendant notified us that they deposited
22 money into this credit card. Plaintiff didn't know about it,
23 I didn't know about it, the reason being is because it's not
24 her credit card. And we told defendant this and they still
25 filed this motion, they know about this. My office manager

1 has a credit card that has her name on it; it's not her credit
2 card. Any money that is put into the credit card she would
3 never see, she would never see the benefit of, she doesn't see
4 the bills or anything like that.

00:18

5 Plaintiff here is an office manager of a dentist
6 office. She was given a credit card for office expenses. As
7 part of her perk for working there, her employer granted her a
8 gym membership. She was the one who went to the gym, so she
9 used that credit card because she knew it would be billed to
10 her employer, she was granted permission to do that.

00:18

11 When the employer got a 1,501 credit on his credit
12 card, he was blown away. He called Work Out World; Work Out
13 World said I don't know what this this is. He called his
14 credit card; his credit card company told him we can't do

00:18

15 anything, wait until it hits your bank account and then write
16 them a check, which is what the employer did. Waited until
17 hit his bank account, took the check, went to his Work Out
18 World because when he called Work Out World he couldn't get
19 someone on the phone, when he finally got someone on the phone
20 they said I don't know what this is.

00:19

21 So to argue that the plaintiff received the money is
22 just incorrect; she didn't even know about it until I put her
23 on notice. She never saw the benefit of it; didn't say her
24 name, 1,501 to Noreen Sussino, it just say WOW Tender of
25 Judgment.

00:19

1 Now, for academic purposes I'd like to make the
2 argument that even if she did receive the money it's
3 irrelevant. What *Campbell-Ewald* said, is that you can't make
4 an offer of judgment, it won't moot a class, every plaintiff
5 should be afforded the opportunity to do class discovery.
6 What the Supreme Court did not decide is what would happen if
7 the money was actually tendered and received.

8 The defendant stated earlier, which is incorrect,
9 that the Supreme Court said that all you need to do is tender
10 and have the money received; the Supreme Court did not say
11 that, they just said we're not answering that question because
12 it's not before us. So it's a misrepresentation to say that's
13 what the Supreme Court stated.

14 Now, after that decision, defendants, using this
15 gamesmanship, decided that they're going to start doing that.
16 And the Ninth Circuit recently held in *Chen v. Allstate*, after
17 the plaintiff was given \$20,000, held a would-be class
18 representative with a live claim of her own, must be accorded
19 a fair opportunity to show certification is warranted. And
20 they dismissed defendant's motion to dismiss, and the case
21 moved forward.

22 In a more recent decision, *South Chiropractic* --
23 sorry. *South Orange Chiropractic v. Cayan*, defendant did the
24 same thing; they paid money to the plaintiff, defendant filed
25 a motion to dismiss, which was denied. They attempted to file

1 an interlocutory appeal, which was denied because the court
2 stated, and this is important, and I quote, "A defendant
3 cannot moot a proposed class action solely by paying off the
4 named plaintiff." And concluded that because there was no
5 difference of opinions between the courts, there's no reason
6 to hear the appeal. They didn't even hear the appeal.

7 Now, the only cases defendant brings, again, are not
8 factually similar to our case. Two of them are individual
9 cases, no class action, no need to do class discovery; and the
10 third case was a case in which the plaintiff was granted an
11 opportunity to do class discovery, did class discovery, filed
12 their class cert motion which was denied, at which point
13 afterward the court said now if you offer an offer of judgment
14 we'll dismiss the case as being moot, because there is no more
15 class discovery to be done.

16 So again, the defendant on this argument is asking
17 the Court to ignore the facts that plaintiff never received
18 the money; and even if the plaintiff received the money to be
19 the one outlier case to decide to moot a case based off of a
20 Rule 68 offer. And for those reasons we ask the Court to
21 dismiss the defendant's motion.

22 THE COURT: Okay, thank you.

23 Do you wish to reply briefly?

24 MR. BAUCHNER: Very briefly, your Honor. First, I
25 don't like to be accused of misrepresentation; I draw the

1 Court's attention to the *Campbell-Ewald* case at 671, where the
2 court actually cited to three cases, *San Pablo*, *San Mateo* and
3 *Little*, where it distinguished instances where the plaintiff
4 actually received the funds and found that satisfied Rule 68.
5 So it's not a misrepresentation to say the Supreme Court drew
6 that distinction.

7 Secondly, your Honor, everything counsel said with
8 respect to what the employer may have done is not in the
9 record before this Court. There's no certification or

10 declaration from the employer, that's all counsel's hyperbole
11 and it's not before the Court. We know the money went into
12 the account; we know plaintiff signed a membership agreement
13 that said it's my credit card, perhaps under false pretenses
14 but that's what she signed, and we refunded money to that
15 account. To the assertion it's only for office expenses is
16 belied by the fact that it's apparently also used by her for a
17 personal gym membership.

18 And finally, your Honor, I think you hit it on the
19 head, repeated and annoying calls. The argument from counsel
20 that he didn't look at her records to see if there's any
21 additional calls I think is a little specious. There's an
22 amended complaint filed; earlier if they were trying to cure
23 the injury issue in the original complaint they would have
24 looked at the record, I'm sure they did, there were no more
25 calls.

1 There was one call, your Honor, that is not repeated
2 and that is not annoying. If there were additional calls that
3 they could have waited and the rest, that's nonsense. One
4 unanswered phone call, your Honor, that is not a concrete
5 injury.

00:23

6 THE COURT: Okay, thank you.

7 MR. MARCUS: Can I just make one quick point?

8 THE COURT: You may.

9 MR. MARCUS: I'm conceding there's one call, that's

00:23

10 fine. And repeated and annoying would go towards whether
11 there's a TCPA violation, it wouldn't go towards standing. If
12 defendant wants to argue there's no violation of TCPA unless
13 you have repeated and annoying they can make that argument,
14 that shouldn't go toward the standing argument.

00:23

15 THE COURT: All right. So, a motion to dismiss for
16 want of standing is properly brought pursuant to 12(b)(1).

17 It's a jurisdictional issue. *Constitutional Party*, 777 F.3d

18 347, 357. Generally, the court must accept as true all

19 material facts or allegations in the complaint, and construe

00:24

20 the facts in favor of the non-moving party. That's *Storino v.*

21 *Point Pleasant*, 322 F.3d 293. Plaintiff always bear the

22 burden of establishing standing. Generally, standing comes

23 under cases in controversy as in the federal Constitution, and

24 the doctrine of standing gives meaning to these constitutional

00:24

25 limits by identifying those disputes which are appropriately

1 resolved in the judicial process. That's *Lujan*, 504 U.S. 555.
2 To establish standing you usually need an injury in fact;
3 causal connection between the injury and the conduct
4 complained of, and the likelihood that the injury will be
5 redressed by a favorable decision. That's *Lujan* again at 561.
6 Generally, the injury, to be sufficient, must be concrete and
7 particularized.

8 And that brings us to the *Spokeo* case, and it's a
9 decision by Judge Alito. So within that *Spokeo* case, Justice
10 Alito identified the terms concrete and particularized, upon
11 which the plaintiff must show in order to have a case or
12 controversy. And for the injury to be particularized, it must
13 affect the plaintiff in a personal and individual way. And
14 then he indicates that the injury must also be concrete;
15 concrete injury must be de facto, that is, it must actually --
16 it says: When we have used the adjective concrete, Judge
17 Alito writes, we have meant to convey the usual meaning of
18 that term, real and not abstract. And he cites to Webster's
19 Dictionary. And then he indicates that concreteness is
20 different than particularization, and that both needed to be
21 shown in order to have standing. Concrete is not always
22 synonymous with tangible, but Alito says intangible injuries
23 can nevertheless be concrete. And then there's some
24 explanation of that, and he does add in there that: In
25 addition, because Congress is well positioned to identify

1 intangible harms that meet minimum Article III requirements,
2 its judgment is also instructive and important. Thus, in
3 *Spokeo*, Alito continues, Congress may elevate the status of
4 legally cognizable injuries, concrete de facto injuries that
5 were previously inadequate in law, and there he's citing to
6 *Lujan* at page 578.

7 And in all these TCPA cases there's this underlying
8 thought that Congress has passed the statute, and therefore
9 they're identifying a concrete injury that has occurred to the
10 person. So, with regard to that, I decided that I should look
11 at the Telephone Consumer Protection Act to see if this is the
12 type of case that Congress was trying to protect people
13 against. And here, it seems to be admitted by Mr. Marcus that
14 there was only one telephone call, and it lasted -- I believe
15 it was a minute and a few seconds. And, at any rate, when
16 Congress was enacting the Telephone Consumer Protection Act,
17 it had four purposes: (1) minimizing random solicitation
18 calls which tied up private and business phone lines and fax
19 machines; (2) the prevention of annoying and repeated
20 telemarketing calls and blast faxes, amounting to invasion of
21 privacy; (3) elimination of the imposition of nonconsensual
22 calls to recipients of calls and faxes who have no prior
23 relationship with the advertiser; (4) debt collection and
24 creditor calls initially were not considered to fall within
25 the ambit of the TCPA, which was directed to advertisers and

1 solicitors. So, that's another purpose I take it. But
2 generally, if you look at those purposes, when it says "tied
3 up private and business phones", this means if the phone is
4 tied up, and that is usually not the case on a one-minute
5 call.

6 Secondly, the prevention of annoying and repeated
7 telemarketing calls, seems to require that there needs to be
8 some type of pattern or repeatedness to the telephone calls,
9 so that does not mean once; there's three, five, seven,
10 something like that. We've all been subject to those calls
11 once or twice in our past. It's those types of telephone call
12 patterns that Congress was looking at.

13 The elimination of nonconsensual calls to recipients
14 -- and it's in the plural there -- of the calls and faxes, who
15 had no prior relationship; so that seems to indicate that
16 Congress was thinking about more than one call. And then it
17 gets into the debt collectors and creditor callers.

18 So generally, when you look at concreteness -- and
19 concreteness, as I had indicated, that is, it must actually
20 exist; we have used the word concrete, we have meant to convey
21 the usual meaning of the term -- real and not abstract. And
22 this one-minute call -- and I know plaintiff talks about the
23 loss of battery power and things of that nature; but that
24 seems de minimus to me. There was a time when this statute
25 was enacted where parties paid for calls they received, but I

1 don't think that that's at issue in the complaint. And most
2 of the calling plans or telephone cellphone plans, now you can
3 get unlimited amount of calls that you pay for, and there
4 doesn't seem to be that allegation in the complaint that I
5 could see.

6 Paragraph 18 of the complaint says: On or about
7 July 28th, 2015, plaintiff received a telephone call on her
8 cellular phone. And that's really the full explanation.

9 There's no pattern related to it, there's no repeatedness,
10 there's no annoying -- it wasn't really that annoying.

11 Paragraph 20 does say there was a prerecorded message, and it
12 was followed by a six-second pause and lasted one minute and
13 two seconds in total. So, it doesn't seem as if it's a
14 significant period of time, and it doesn't seem to be annoying
15 in the sense that I think of that word.

16 So, with regard to the *Spokeo* case, it's my view
17 that, as explained by Judge Alito in that case, the
18 concreteness is not really set forth within the complaint.
19 Any injury seems to be rather abstract; a loss of some de
20 minimus battery power over a minute, doesn't seem to be
21 significant in my mind.

22 And I've looked at these other cases, I should just
23 point that out. The first case the plaintiff cited to was
24 *Booth v. Appstack*, and there the court wrote: The TCPA
25 violations alleged here, if proven, require plaintiffs to

1 waste time answering or otherwise addressing widespread
2 robo-calls. Then it adds: The use of the auto dialer, which
3 allegedly enabled defendants to make massive amounts of calls
4 at low cost and in a short period of time amplifies the
5 severity of this injury; such injury is sufficiently concrete
6 to confer standing. And that's *Booth* at 2016 WL 3030256 at
7 page 5. To me, this case is different; it's one call, it's
8 not a massive amount of calls, it's not widespread robo-calls.
9 So, I don't see how the *Booth* case is analogous to the facts
10 that we have here.

11 In the *Rogers* case, 2016 WL 3162592, the plaintiffs
12 allege that the calls were made to their personal cellphone
13 numbers; they have suffered particularized injury because
14 their cellphone lines were unavailable for a legitimate use
15 during the unwanted calls. Again, it talks about calls, so
16 there was always more than one. So it had this element which
17 Congress was talking about -- repeated and annoying.

18 But then in the *Johnson* case, the court talked about
19 how any harassment caused by these calls was actionable. And
20 again, it was calls, and it was harassment; I don't see any
21 harassment in the one call that would have any legal impact
22 anyway.

23 Then in *Mey v. Got Warranty*, the court denied
24 defendant's motion to dismiss because there were intangible
25 injuries, and they cite to limited cellphone minutes. But the

1 limited cellphone minutes seems to me to go to those old
2 calling plans where you had to pay for each call, even if you
3 received it. And to me, the depletion of battery life for a
4 minute doesn't amount to a type of injury that we would call
5 concrete and particularized.

6 So having reviewed those cases as well, the Court
7 finds that the defendant's motion to dismiss for lack of
8 standing is granted.

9 With regard to the second motion, I don't really
10 think I need to answer that having dismissed the complaint, so
11 I'll deny it as moot. But I would say that if it were to go
12 forward, I would permit discovery on that motion.

13 You don't see any reason why I need to handle the
14 *Campbell* matter, do you?

15 MR. BAUCHNER: No, your Honor, not in light of your
16 dismissal.

17 THE COURT: Okay. So for those reasons, the
18 defendant's motion to dismiss is granted. Mr. Marcus had
19 indicated that he was stipulating that there was only one
20 call, so I don't see how I can allow an amendment at this
21 point, because it would be futile based on the rationale that
22 I had decided. So, thank you for coming in.

23 MR. MARCUS: Thank you, your Honor.

24 MR. BAUCHNER: Thank you, your Honor.

25 (Matter concluded.)

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